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CHARLES ELMORE CRUMLEY

In the
Supreme Court of the United States
OCTOBER TERM, 1942

No. 664

W. L. NIX

VS.

THE UNITED STATES OF AMERICA

**BRIEF SUPPORTING PETITION FOR WRIT
OF CERTIORARI**

EUSTIS MYERS,
Counsel for Petitioner.

HOWARD DAILEY,
Of Counsel.



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SUPPORTING BRIEF

To the Honorable, the Supreme Court of the United States:

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Opinions of the Courts Below

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit will be found in the appendix hereto; the trial court filed no opinion.

Jurisdiction

(a) The opinion of the United States Circuit Court of Appeals for the Fifth Circuit, appearing in the appendix hereto, was handed down November 21st, 1942, and petition for rehearing was denied December 23rd, 1942, without written opinion.

(b) This Court has jurisdiction under Title 28, Sec. 347 (a), U. S. C. A., and should take cognizance of this case under Rule 35 B of the Rules of the United States Supreme Court, and under Rule 36 thereof.

On February 16th, 1937, there was returned into the United States District Court for the Northern District of Texas, Dallas Division, Indictment No. 8920, charging petitioner in 34 counts with having wilfully and unlawfully attempted to defeat and evade payment of the taxes on gasoline manufactured by him, and with having wilfully and unlawfully failed and refused to pay such taxes, in violation of Section 3412, Title 26, U. S. C. A., and No. 8922, charging petitioner and Sid B. Pope with having violated the same statute, laws, and regulations thereunder, in 14 Counts.

The even counts of each of these indictments attempt to charge the wilful and unlawful failure and refusal to pay taxes due, and the odd counts charge the wilful and

unlawful attempt to defeat and evade such payments. Each of the odd counts of the indictment, while attempting to charge such attempt to defeat and evade payment of the taxes due, charge also the wilful and unlawful failure and refusal to pay same, thereby charging two distinct and separate offenses in the same Counts of the indictments. Each and every count of the indictments allege that the gasoline manufactured and sold by petitioner, upon which the taxes became due, was sold to persons, not within the excepted classes to whom gasoline might be sold tax free, towit, "a producer of gasoline", but did not plead such gasoline was not sold to numerous of the other excepted classes of persons.

Appellant seasonably and timely filed his general and special demurrers to each of the indictments, and moved to quash each of them and each count of them alleging, among other things, that the odd counts of each of them were duplicitious, in that each of such odd counts attempt to charge two offenses, towit, the wilful and unlawful attempt to defeat and evade the payment of the taxes alleged to have been due, and the wilful failure and refusal to pay such taxes; urging also in his said demurrer, petitioner set out that there was a fatal misjoinder of offenses in each of said indictments in that Counts 1 to 14 allege such violation by petitions while operating Texas Refinery; Counts 15 and 16 charge such violations operating Texas Refinery, Adams Oil Co., lessee; counts 17 and 18 charge such violations operating A. J. Adams Oil Co.,

Texas Plant; Counts 19 to 22, inclusive, charge such violation while operating Keystone Refinery; Counts 23 and 24 charge such violations operating Keystone Refinery, Adams Oil Co., lessee; Counts 25 and 26 charge such violations by operation of Triangle Refinery, Adams Oil Co., lessee; counts 27 and 28 charge such violations while operating A. J. Adams Oil Company, Triangle Refinery; and Counts 31 to 34, inclusive, charge such violations while operating Adams Oil Company, Big Sand Plant, with no allegations (which also were not proved during the trial) of common ownership and control, and petitioner alleged in his said demurrer and motion to quash that each of the violations alleged to have been committed by petitioner in the operation of the separate and distinct refineries, if committed at all, were separate and distinct offenses, and not so connected together as would permit their prosecution in one indictment, all of which were by the Court overruled, and petitioner then and there excepted. At the close of the Government's case upon the trial, and when both sides had closed, petitioner renewed each of his demurrers and motions to quash, which were again overruled, and to which petitioner again duly excepted.

The case was called for trial on June 14th, 1937, the indictments, Nos. 8920 and 8922, were consolidated as to petitioner, since that at a previous term of this Court Sid B. Pope had entered his plea of guilty to the offenses charged in cause No. 8922, and had been given eighteen months in the United States Penitentiary at Leavenworth,

Kansas, suspended for two years, conditioned upon good behavior, and only petitioner remained to be tried. On the 16th day of June, 1937, petitioner was convicted on each and every count of the indictments, consolidated, and was by the Court sentenced to pay a fine of \$10,000.00 on Counts 2, 4, 6, 8, and 10, and to serve Five years in the United States Penitentiary at Leavenworth, Kansas on the remaining counts, generally, the five years to be suspended, conditioned (1) good behavior; (2) the payment of \$5,000.00 of the fine within 90 days; (3) remaining \$5,000.00 in 18 months; (4) the payment to the Government of the taxes alleged to be due (some \$84,000.00 plus penalties and interests) within eighteen months.

At the close of the Government's case, after having renewed his general and special demurrers and motions to quash, as above set out, petitioner moved for an instructed verdict of not guilty, for the reasons that (1) there was a fatal variance between the allegations and proof, in that it was alleged in the indictment that petitioner sold gasoline set out in the indictment to persons not within the excepted classes towit, "producers of gasoline", whereas, in truth and in fact, each and every sale alleged to have been made by petitioner upon which he owed taxes had been sold to "producers of gasoline" for resale, and such transactions were exempt from the payment of the taxes; and (2) because the law under which petitioner was being tried (Sec. 3412, Title 26, U. S. C. A.) exempted petitioner from the payment of taxes on these sales. Although each and

every witness produced by the government to testify of the sales of gasoline upon which taxes alleged to have been due, and of which petitioner was charged with having attempted to defeat and evade and with having wilfully failed and refused to pay, testified such gasoline had been sold to "a producer of gasoline" for resale, the Court overruled the motion, which was renewed when defendant had rested his case, and when both sides had closed, which was also overruled, to all of which appellant then and there duly excepted; the evidence tended to show that petitioner had collected certain of the taxes from the purchasers thereof when the gasoline was sold which were not remitted to the Government but, if he had so done, that would constitute a separate and distinct offense, not charged in the indictment, to the offenses for which petitioner had been indicted and was being tried.

Upon the trial of the case, the Government tendered as certain of its witnesses, Ben P. Pipgrass, E. S. Horner, Ballard Clark, John Stephens, and E. P. Harvey, being the witnesses who had purchased, or had represented the purchasers, of all the gasoline alleged in the indictments, consolidated, to have been sold by petitioner upon which he was alleged to have attempted to defeat and evade payment of the taxes due thereon and which he was alleged to have wilfully failed and refused to pay, and having been examined on voir dire by petitioner under permission of the Court, all testified that they were "producers of gasoline" or represented "producers of gasoline" in their

respective purchases of gasoline from petitioner, and that the gasoline so purchased was purchased for resale; petitioner objected to the testimony of each of these witnesses, for the reason that they were "producers of gasoline", that the gasoline purchased from petitioner by them was purchased for resale, and, therefore, these transactions were exempt from the payment of such taxes by petitioner, such testimony was irrelevant, immaterial, prejudicial and contrary to the allegations contained in the indictment, which objections were by the Court overruled, and to which action the defendant then and there excepted.

Also upon the trial of this cause, the Government called as one of its witnesses, Sid B. Pope, joint defendant with petitioner in cause No. 8922, consolidated, who testified that he was head bookkeeper and auditor for petitioner for a while; that he had in his possession certain books and records belonging to petitioner, that his duties only was to keep books and serve as auditor for petitioner, that his duties went no further, and that he had nor did he exercise any control over the business or policies of the companies operated by petitioner. Having been permitted to be examined by petitioner on voir dire, he testified further that petitioner did not give him his permission to take and produce such books and records, and that no search warrant had been issued to seize them, he nevertheless was permitted, over the objection of petitioner, to testify that certain of the books and records he had in his possession

showed certain gasoline taxes due by petitioner that had not been paid.

Petitioner was unable to meet the conditions of his suspended sentence, and after various delays and extensions of time within which he might do so, a part of which time, petitioner was a fugitive from the jurisdiction of the Court, he voluntarily appeared before the Trial Court on April 23rd, 1942, admitted his inability to so comply, and was sentenced to two years confinement in the United States Penitentiary at Leavenworth, Kansas, with no fine, no provisions as to the payment of taxes, and without further suspended sentence; that immediately upon the so sentencing of petitioner, the Honorable T. Whitfield Davidson, United States District Judge for the Northern District of Texas, who had presided over petitioner's trial, and who had meted out all sentences, left for Washington, D. C., for an extended time to hold Court in the District of Columbia; that appellant, in due time after the sentence imposed on April 23rd, 1942, appealed his case to the United States Circuit Court of Appeals for the Fifth Circuit, and consulted with and received orders from that Court with reference to the perfection of his appeal instead of the Trial Court, who was away; that in due time and within the time allowed him by the Circuit Judges, he prepared and filed his bill of exceptions and assignment of errors; that thereafter, being unable to pay the United States District Clerk for a transcript, and to pay costs of printing and other expenses incident to his appeal, he filed his

paupers oath and petition to the United States Circuit Court of Appeals for the Fifth Circuit, seeking to prosecute his appeal in forma pauperis; the United States District Attorney seasonably filed his motion to dismiss the appeal on the grounds that no transcript of the record and no brief had been filed, and that petitioner had not paid the costs incident to the appeal, and that petition for permission to prosecute appeals in forma pauperis should be denied on the grounds the appeal was without merit.

The motion was set down for hearing before the United States Circuit Court of Appeals for the Fifth Circuit at its November (1942) Term at Fort Worth, Texas, and was orally argued, and on November 21st, 1942, the Court rendered its opinion dismissing the appeal, solely on the grounds that the sentence entered on April 23rd, 1942, could not be appealed from, that petitioner should have instituted his appeal within five days from the date of his original conviction, June 16th, 1937, and denied permission to prosecute appeal in forma pauperis, copy of which said opinion is here brought forth and appears in Appendix.

Petitioner duly and timely filed his petition for rehearing, and on the 23rd day of December, 1942, the Court overruled same without written opinion; that upon petitioner's petition, timely filed, the United States Circuit Court of Appeals for the Fifth Circuit, stayed issuance of mandate herein for thirty days from December 23rd, 1942,

to allow him to prosecute this petition for certiorari to this Honorable Court.

Specifications of Error

(a) The Trial Court erred in failing and refusing to sustain petitioner's general and special demurrers to the indictment, presented and urged, timely, prior to petitioner's plea thereto, and renewed at the close of the Government's case, and when both sides had rested, because said indictments were duplicitious, in that the counts thereof, contained two separate and distinct offenses, pleaded in same counts.

(b) The Trial Court erred in failing and refusing to instruct a verdict of not guilty, timely sought by petitioner after the Government rested its case and when both sides had rested, for the reason that the indictment alleged in each of their counts, that petitioner had sold gasoline to persons "other than producers of gasoline" upon which he owed the Government one cent per gallon as taxes, whereas the proof showed that all gasoline sold by petitioner was sold to producers of gasoline for resale, and was, therefore, exempt from the payment of such taxes.

(c) The Trial Court erred in failing and refusing to sustain petitioner's objection to the damaging testimony of Sid B. Pope, who was permitted to produce certain documents belonging to petitioner and testify therefrom after

it had been shown that petitioner did not give the witness, or any one else, permission to so produce same and that no search warrant was issued to seize same.

(d) The Circuit Court erred in dismissing petitioner's appeal without reviewing the record on the grounds that petitioner was convicted June 21st, 1937, and did not file his notice of appeal until April 28th, 1942, for the reason that, upon his conviction on June 21st, 1937, petitioner was sentenced to a fine of Ten Thousand Dollars, to serve Five Years in the United States Penitentiary at Leavenworth, Kansas, suspended, conditioned that he pay Five Thousand Dollars of the fine within ninety days, the remainder of the fine and all taxes alleged to be due by petitioner (\$86,000.00 plus penalties and interest) within eighteen months from the date of conviction, and that, after various delays and extensions, the suspended sentence was revoked, the trial court entered an entirely new and final judgment, in which he sentenced petitioner to serve two years in the United States Penitentiary at Leavenworth, Kansas, with no fine and with no provisions of payment of taxes, and petitioner duly and seasonally filed and duly prosecuted his notice of appeal within five days from the date of this last and final judgment.

Argument

(1) STATEMENT. Petitioner is much handicapped in presenting this case to this Honorable Court, for the

reason that, after his conviction herein, and for a long time prior thereto, he was a pauper, within the meaning of the statute, and while he secured the money to pay for the court reporter's preparation of his bills of exception, he has never been able since to pay for a transcript, printing of the record, and payment of costs incident to his appeal. Therefore, he is unable to refer to any record of the proceedings, but is merely able to present such matters as the faith of this Honorable Court in his counsel's integrity will permit.

(2) **DUPLICITY OF INDICTMENT.** Each of the odd counts of the indictments, consolidated, attempt to charge petitioner with having attempted to defeat and evade the payment of taxes due on gasoline manufactured and sold by him, a separate and distinct offense, and with having wilfully and unlawfully failed and refused to pay such taxes, also a separate and distinct offense. Petitioner recognizes the broad discretion of the trial court, but urges that to allow the pleader to charge two separate and distinct offenses in the same counts of indictments is so far afield from the recognized practice of pleading that the trial court cannot, within his sound discretion, let such things go without notice.

(3) **INSUFFICIENCY OF THE EVIDENCE.** The indictments in this case, consolidated, specifically alleged that petitioner manufactured and sold the gasoline upon which he attempted to defeat and evade the taxes due and upon which he wilfully and unlawfully failed and refused to

pay, to persons "other than producers of gasoline for resale", whereas, in truth and in fact, every witness produced by the Government who had purchased such gasoline, testified that they were "producers of gasoline" and had bought the gasoline from petitioner for resale, and had actually resold it to the general public in their respective capacities of sellers and distributors of gasoline. *The record unquestionably shows this.*

The Government sought to justify its position on the theory that such purchasers, who, under the regulations issued by authority of the Act Of Congress under which the indictments were brought (Title 26, Sec. 3412, U. S. C. A.) provided that such purchasers might either buy it tax free from the original producer and pay such taxes themselves, or that they might pay the taxes to the original producer and sell it tax free to the public, and in the case at bar, such purchasers had actually paid the taxes to petitioner, and that petitioner had failed and refused to remit it to the Government. Petitioner admits this to be the law under such regulations issued, but he was indicted for having sold gasoline to persons other than "producers of gasoline for resale", and that, therefore, was guilty of the offense charged. Admitting all the contention of the Government to be true, yet it remains that petitioner could not be convicted for the offenses charged in the indictment under the evidence produced by the Government. No doubt, under the Government's theory of the case, petitioner was guilty of some offense, but certainly not of having sold

gasoline to persons "other than producers of gasoline for resale." This is so evident, petitioner deems it unnecessary to pursue this point further.

(4) SEARCH AND SEIZURE. Sid B. Pope was indicted jointly with petitioner in cause No. 8922, but not in cause No. 8920, with which 8922 was consolidated, and his cause had been disposed of at a previous term of court, wherein the said Sid B. Pope had received a suspended sentence of eighteen months in the United States Penitentiary at Leavenworth, Kansas, and was, at the time of his testimony, for the purpose of the record and under the law, merely a witness for the Government. He testified that he had served for a while as bookkeeper for petitioner, that he had no other authority, that he owned no interest in petitioner's refineries, that his connection with petitioner's business had long ago ceased, that petitioner did not give him any authority to produce his books and records into court, nor was he producing them under any writ or authority of the court, yet he was permitted, over the timely objection of petitioner, to testify from such books and records to the effect that such books and records showed a large amount of gasoline had been manufactured and sold by petitioner upon which petitioner had not paid the taxes alleged to have been due. Petitioner respectfully urges that this was clearly in violation of the provisions of the Fifth Amendment to the Constitution of the United States.

(5) TIMELINESS OF APPEAL. Petitioner was originally convicted in this cause June 21st, 1937, and was sentenced by the court to pay a fine of Ten Thousand Dol-

lars and to serve five years in the United States Penitentiary at Leavenworth, Kansas, the imprisonment suspended, conditioned that petitioner pay Five Thousand Dollars of the fine 90 days from that date, and pay the remaining Five Thousand Dollars and all taxes alleged to be due (approximately \$134,000.00, including penalties and interest) within eighteen months. After various extensions and delays, and on April 23rd, 1942, petitioner voluntarily appeared in the United States District Court for the Northern District of Texas, admitted his inability to comply with the provisions of this suspended sentence, and the trial court entered a new, separate, and distinct judgment from the one originally entered, and sentenced petitioner to serve two years in the United States Penitentiary at Leavenworth, Kansas, with no fine and with no provisions as to the payment of the taxes alleged to have been due.

From the last and final judgment, petitioner duly and seasonably prosecuted his appeal to the United States Circuit Court of Appeals for the Fifth Circuit, and that Court dismissed his appeal on the grounds that such appeal was not timely taken, as will more fully appear in its opinion in the appendix hereto.

Petitioner admits that this Honorable Court has held that one may appeal from a judgment of a trial court upon which a conviction was had but sentence suspended, although up to the time this Court so ruled, several circuit courts of appeal had held that such could not be done on the grounds that there was no final judgment from which to appeal. However, this Court has not said that one might

not wait until his suspended sentence is changed and put into effect and then appeal. Petitioner earnestly urges that the judgment of conviction entered in his cause on April 23rd, 1942, being a new, separate, and distinct judgment from that entered September 21st, 1937, is appealable from, and that having diligently prosecuted his appeal from that sentence, it was error for the Circuit Court to so dismiss his appeal. He further urges that the cases cited by the Circuit Court have no application to the points involved in his case, and the questions here presented, not having been passed upon and settled by this Honorable Court, are of such importance as to highly justify the granting of this writ.

As has been referred to in his petition for this writ, petitioner is a pauper and filed his pauper's oath before the United States Circuit Court of Appeals and in this Court, along with his petition for certiorari, and earnestly desires to be permitted to prosecute this writ, and to be allowed to amend his brief after the record shall have been ordered and prepared, but, under the present status of the record, can do no more than briefly call this Honorable Court's attention to the errors complained of, which, petitioner alleges, certainly affected his substantial rights.

Respectfully submitted,

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